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CHARLES ELMO

In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 35.

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Appellant,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Appellees.

BRIEF FOR APPELLEES.

HENRY W. HARTER, Jr.,
HARRY NUSBAUM,
Counsel for Appellees.

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INDEX.

I. Status of Foreign Consuls 1

A. Opinion of Secretary of State of United States 2

B. Where Exequatur Revoked, Consul Not Entitled to Immunity Against Procedure in State Courts 4

C. Statute Strictly Construed 4

II. Jurisdiction of Federal Courts Over Causes Affecting the Domestic Relations 4

III. Construction of Statutes 5

Conclusion 6

Cases Cited.

Barber vs. Barber, 21 Howard, 582 4

Bird vs. U. S., 187 U. S. 118, 23 Sup. Ct. Rep. 42 6

Bowman vs. Bowman, 30 Fed. 849 4

Brewer vs. Blougher, 14 Pet. 178, 39 U. S. Sup. Ct. Rep. 177 6

Carbone vs. Carbone, 206 N. Y. S. 40 4

De La Roma vs. De La Roma, 201 U. S. 303 5

Hawaii vs. Mankichi, 190 U. S. 197, 23 Sup. Ct. Rep. 213, 787 ..... 5, 6

In Re: *Hobbs* case, No. 6550, Fed. cases 5

Johnson vs. Johnson, 13 Fed. 193 4

Popovici vs. Popovici, 29 Fed. (2nd) 5, 6

Savic vs. City, 193 N. Y. S. 577, 579 2

Savic vs. City of New York, (1922) 196 N. Y. S. 442, 444, 203 App. Div. 81, affirming (1922) 193 N. Y. S. 577, 118 Misc. Rep. 156 ..... 2, 4

Simms vs. Simms, 175 U. S. 162 5

U. S. vs. Kirby, 74 U. S., 482 5

In Re: Burns, 136 U. S., 586, 594, 595, 596 4

United States Judicial Code, Sec. 256, paragraph 8, (Title 28, Sect. 371, U. S. Code, Sect. 1233) 6

9 R. C. L., 156 1

In the Supreme Court of the United States

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No. 35.

THE STATE OF OHIO on the relation of
JOHN C. PROVOST, Vice Consul of Roumania,
215 Bulkley Bldg., Cleveland, Ohio,

Appellant,

vs.

ADAM W. ACKER, CHARLES KRUMHOLTZ, EDWIN W. DOAN,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,

Appellees.

BRIEF FOR APPELLEES.

I. STATUS OF FOREIGN CONSULS:

A consul being in a foreign country derives his authority, in effect, from both governments. He receives his commission from the country which he represents and obtains his exequatur from the country to which he is sent. It is, in truth, solely by virtue of the authority vested in him by the country to which he is sent that he is able to exercise his official functions within its territorial limits.

9 R. C. L., 136.

The word "consul" as used in section 236, clearly refers to persons fully endowed with power to act as

sional within the jurisdiction to which they are sent by their government. They are not consuls until they have been recognized as such by the President, usually evidenced by an exequatur, and likewise they cease to be consuls when by his letters patent the President revokes the exequatur.

Consular status does not exist in the absence of the President's recognition of the person accredited by the Foreign State.

Ravie vs. Citty, 192 N. Y. S. 577, 579.

This question is one partly political and partly judicial. So far as the question may be political we may consider the opinion of the Secretary of State of the United States as indicating the political status which such a consul may have.

Ravie vs. Citty, 196 N. Y. S. 462, 466.

4. OPINION OF SECRETARY OF STATE OF UNITED STATES.

COPY

DEPARTMENT OF STATE,
WASHINGTON, D. C.

January 4, 1929.

In reply refer to
811.703/1111-70

Mr. Harry Gudbaum,
Attorney at law,
619 Rockwell Bldg.,
Canton, Ohio.

Sir:

The Department acknowledges the receipt of your letter of December 11, 1927, with reference to the failure of Mr. Popovici, now Vice Consul of Roumania in Cleveland, to provide for the support of his wife and child.

In reply to the questions enumerated in your letter I desire to inform you as follows:

(1) In a note dated November 19, 1926 the Roumanian Minister at Washington informed the Department of the appointment of Mr. Ioan C. Popovici as Roumanian Vice Consul at Cleveland and requested that an exequatur be issued.

(2) As Mr. Popovici's commission of appointment had not been received by the Minister from the Roumanian Government an exequatur was not issued but provisional recognition was accorded Mr. Popovici on December 10, 1926.

(3) In general it may be stated that if a consular officer be guilty of illegal or improper conduct, he is liable to have his exequatur revoked, and, if his conduct is criminal, to be punished according to laws.

(4) It would of course not be proper for this Government to initiate or become a party to legal proceedings in a case of this sort.

Before giving consideration to the action which the Department might take in this matter and which might result in Mr. Popovici's removal from this country, and, consequently, from the jurisdiction of any American court, it is thought that you may care to take such steps as may be provided by the laws of Ohio so that the judgment of the local court may be executed against Mr. Popovici in Cleveland.

I am, Sir,

Your obedient Servant,

For the Secretary of State,

W. R. Castle,

Assistant Secretary.

B. WHERE EXEQUATUR REVOKED, CONSUL NOT ENTITLED TO IMMUNITY AGAINST PROCEDURE IN STATE COURTS:

A consul duly appointed to the United States by a foreign country, but whose exequatur has been revoked, is not within subdivision (8) of this section, granting immunity against state court proceedings to ambassadors and consuls.

Savic vs. City of New York, (1922) 196 N. Y. S. 442, 203 App. Div. 81, affirming (1922) 193 N. Y. S. 577, 118 Misc. Rep. 156.

The immunity granted consuls against proceedings in state courts is granted as a matter of policy, and not because of any treaty. Id.

International law gives consuls and other diplomats no immunity from civil or criminal process. Id.

C. STATUTE STRICTLY CONSTRUED:

A foreign diplomatic attache, accredited to another foreign power, cannot, while traveling in this country, claim immunity from service of process or from arrest under Federal Judicial Code, which applies only to those of diplomatic status accredited to United States Government.

Carbone vs. Carbone, 206 N. Y. S. 40.

II. JURISDICTION OF FEDERAL COURTS OVER CAUSES AFFECTING THE DOMESTIC RELATIONS:

A. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

In Re: *Burns,* 136 U. S., 586, 594, 595, 596;

Barber vs. Barber, 21 Howard, 582;

Johnson vs. Johnson, 13 Fed. 193;

Bowman vs. Bowman, 30 Fed. 849;

Simms vs. Simms, 175 U. S. 162;

De La Roma vs. De La Roma, 201 U. S. 303.

B. Marriage laws are under the control of the States and are not annulled, or affected by the Civil Rights Bill of Congress or the Fourteenth Amendment to the Constitution of the United States.

IN RE: *Hobbs* case, No. 6550, Fed. cases.

The United States District Court, Northern District of Ohio, Eastern Division, held that neither Article III, Sec. 2, of the Constitution of the United States, nor U. S. J. Code, Sect. 256, par. 8, (Title 28, Sect. 371, U. S. Code, Sect. 1233) granted jurisdiction, in divorce cases, to the Federal Court for we attempted to bring this very action into the Federal Court.

Popovici vs. Popovici, 29 Fed. (2nd).

III. CONSTRUCTION OF STATUTES:

1. In interpreting a statute the intention of the law making power will prevail even against the letter of the statute; a thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter.

Hawaii vs. Mankichi, 190 U. S. 197, 23 Sup. Ct. Rep. 787.

2. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

U. S. vs. Kirby, 74 U. S., 482;

Citing *Hawaii vs. Mankichi,* 190 U. S. 197, p. 213.

3. The operation of a statute may be restrained within narrower limits than its words import, where it is evident that the literal meaning of its language would extend to cases which the legislature never designed to embrace it.

Brewer vs. Blougher, 14 Pet. 178, 39 U. S. Sup. Ct. Rep. 177.

4. There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause great public injury or inconvenience.

Bird vs. U. S., 187 U. S. 118, 23 Sup. Ct. Rep. 42.

5. All laws should receive a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or an absurd consequence.

Hawaii vs. Mankichi, 190 U. S. 197, 23 Sup. Ct. Rep. 787.

CONCLUSION.

That Appellant was at no time issued an exequatur; that Appellant's status being partly political and partly judicial, and the Secretary of State of the United States, having given an opinion as to the political status of Appellant and having recommended procedure as provided by the Laws of Ohio, and the Statute being one that is strictly construed, it is our contention that Appellant does not come within the provisions of said Statute.

Appellant, in the United States District Court, in the case of *Popovici vs. Popovici,* 29 Fed. (2d) argued most strenuously and successfully that the provisions of Article III, Sec. 2, of the United States Constitution, and United States Judicial Code, Sec. 256, paragraph 8, (Title 28, Sect. 371, U. S. Code, Sect. 1233) did not give the Federal

Court jurisdiction in divorce cases, and that Federal Courts could not be turned into divorce courts or courts of domestic relations, and succeeded in obtaining the dismissal of this very divorce case from the Federal Courts. Now, contrary to their contention in the Federal Court, they have placed themselves in the anomalous position of asking this Court to reverse and declare void the findings of the Federal Court, and to place a construction upon said Section which would render the same ineffective, inefficient and work a grave public injury; and probably convert Federal Courts into courts of domestic relations.

WHEREFORE, APPELLEES pray that this Court deny the Writ of Prohibition prayed for, including their costs herein.

Respectfully submitted,

HARRY NUSBAUM,

Counsel for Appellees.